Supreme Court, U.S.
FILED
NOV 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-583

In The

Supreme Court of the United States

October Term, 1987

UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO, LOCAL NO. 1069,

Petitioner,

v.

S.D. WARREN COMPANY, A DIVISION OF SCOTT PAPER COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

S. Mason Pratt, Jr.
(Counsel of Record)
Elizabeth Pearce Hunt
Stephanie E. Lugg

Pierce, Atwood, Scribner,
Allen, Smith & Lancaster
One Monument Square
Portland, Maine 04101
(207) 773-6411

November 10, 1987

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
or call collect (402) 342-2831

QUESTION PRESENTED

Does a federal court have the power to vacate an arbitral award which disregards unambiguous collective bargaining agreement language and substitutes therefor the arbitrator's own brand of industrial justice?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	4
A. There Is No Conflict Among Circuits	4
B. There Is No Important Question Of Federal Law	7
C. The Pending *Misco* Case Is Not A Reason To Grant Certiorari In This Case	11
CONCLUSION	12

TABLE OF AUTHORITIES

Page

CASES

AT & T Technologies, Inc. v. Communications Workers, 475 U.S. 643 (1986) 8

Amoco Oil Co. v. Oil, Chemical & Atomic Workers Int'l Union, 548 F.2d 1288 (7th Cir.), *cert. denied*, 431 U.S. 905 (1977) 10

Arco Polymers, Inc. v. Local 8-74, 671 F.2d 752 (3d Cir.), *cert. denied*, 459 U.S. 828 (1982) 10

Bechtel Constr., Inc. v. Laborers' Int'l Union, 812 F.2d 750 (1st Cir. 1987) 9

Detroit Coil Co. v. Int'l Ass'n of Mach. & Aerosp. Workers, 594 F.2d 575 (6th Cir.), *cert. denied*, 444 U.S. 840 (1979) 7, 10

Ethyl Corp. v. United Steelworkers, 768 F.2d 180 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1184 (1986) 6, 10

F. W. Woolworth Co. v. Miscellaneous Warehousemen's Union, Local 781, 629 F.2d 1204 (7th Cir. 1980), *cert. denied*, 451 U.S. 937 (1981) 10

Fabricut, Inc. v. Tulsa General Drivers, Warehousemen & Helpers, Local 523, 597 F.2d 227 (10th Cir. 1979) 9

H. K. Porter Co. v. United Saw, File & Steel Products Workers, 333 F.2d 596 (3d Cir. 1964) 6

Industrial Mutual Ass'n v. Amalgamated Workers, Local 383, 725 F.2d 406 (6th Cir. 1984) 10

Int'l Bhd. of Firemen & Oilers, Local 261 v. Great Northern Paper Co., 765 F.2d 295 (1st Cir. 1985) 9

Int'l Bhd. of Firemen & Oilers, Local 935-B v. Nestle Co., 630 F.2d 474 (6th Cir. 1980) 4, 5

TABLE OF AUTHORITIES—Continued

Page

Int'l Union of Operating Eng'rs, Local 670 v. Kerr-McGee Refining Corp., 618 F.2d 657 (10th Cir. 1980) 6, 7

Kane Gas Light & Heating Co. v. Int'l Bhd. of Firemen & Oilers, Local 112, 687 F.2d 673 (3d Cir. 1982), *cert. denied*, 460 U.S. 1011 (1983) 5

Local 342, U.A.W. v. T.R.W., Inc., 402 F.2d 727 (6th Cir. 1968), *cert. denied*, 395 U.S. 910 (1969) 10

Manhattan Coffee Co. v. Int'l Bhd. of Teamsters, Local 688, 743 F.2d 621 (8th Cir. 1984), *cert. denied*, 471 U.S. 1100 (1985) 10

Misco, Inc. v. United Paperworkers Int'l Union, 768 F.2d 739 (5th Cir. 1985), *cert. granted*, 107 S. Ct. 871 (1987) (No. 86-651) 11, 12

Mistletoe Express Service v. Motor Expressmen's Union, 566 F.2d 692 (10th Cir. 1977) 4, 6, 10

Morgan Services, Inc. v. Local 323, Chicago & Central States Joint Board, 724 F.2d 1217 (6th Cir. 1984) 4, 6

Posadas de Puerto Rico Assoc., Inc. v. Asociacion de Empleados de Casino de Puerto Rico, 821 F.2d 60 (1st Cir. 1987) 9

Sears, Roebuck & Co. v. Teamsters, Local 243, 683 F.2d 154 (6th Cir. 1982), *cert. denied*, 460 U.S. 1023 (1983) 10

St. Louis Theatrical Co. v. St. Louis Theatrical Bhd., Local 6, 715 F.2d 405 (8th Cir. 1983) 7

Storer Broadcasting Co. v. Am. Fed'n of Television & Radio Artists, 600 F.2d 45 (6th Cir. 1979), *cert. denied*, 454 U.S. 1099 (1981) 7, 10

Super Tire Eng. Co. v. Teamsters, Local 676, 721 F.2d 121 (3d Cir. 1983), *cert. denied*, 469 U.S. 817 (1984) 10

TABLE OF AUTHORITIES—Continued

Page

Teamsters, Local 657 v. Stanley Structures, Inc., 735 F.2d 903 (5th Cir. 1984) 7

Teamsters, Local 863 v. Jersey Coast Egg Producers, 773 F.2d 530 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 1468 (1986) 10

Textile Workers Union, Local 1386 v. American Thread Co., 291 F.2d 894 (4th Cir. 1961) 5

Trailways Lines, Inc. v. Trailways, Inc. Joint Council, 807 F.2d 1416 (8th Cir. 1986), *reh. denied*, 817 F.2d 1333 (8th Cir. 1987) 6

Truck Drivers & Helpers Union, Local 784 v. Ulry-Talbert Co., 330 F.2d 562 (8th Cir. 1964) 7

Trustees of Boston Univ. v. Boston Univ. Chapter, Am. Ass'n of Univ. Professors, 746 F.2d 924 (1st Cir. 1984) 9

United Steelworkers v. Am. Mfg. Co., 363 U.S. 564 (1960) 8, 9

United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) 8, 9, 11

United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) 8, 9

Young Radiator Co. v. Int'l Union, U.A.W., 734 F.2d 321 (7th Cir. 1984) 6

RULE

United States Supreme Court Rule 28.1 1

No. 87-583

In The

Supreme Court of the United States

October Term, 1987

UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO, LOCAL NO. 1069,

Petitioner,

v.

S.D. WARREN COMPANY, A DIVISION OF SCOTT PAPER COMPANY,[1]

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

[1]In satisfaction of the requirements of United States Supreme Court Rule 28.1, Scott Paper Company has the following subsidiaries and affiliates (except wholly-owned subsidiaries): Scott Iberica, S.A.; Taiwan Scott Paper Corporation; Cellulosa Jujuy, S.A.; Compania Industrial de San Cristobal, S.A.; COPA-Companhia de Papeis; Sanyo Scott Company Limited; Scott Paper Company de Costa Rica, S.A.; Scott Paper Limited; Scott Trading Limited; Ssangyong Paper Co., Ltd.; Thai-Scott Paper Company; Brunswick Pulp Land Company (partnership); Canso Chemicals Limited; Mountain Tree Farm Company.

STATEMENT OF THE CASE

This case hinges upon the construction of a certain collective bargaining agreement between the parties governing the production employees at Respondent's (hereinafter sometimes referred to as the "Company") paper mill in Westbrook, Maine. After three mill employees were discharged for violation of a specific contract rule, Rule 7(A), prohibiting possession, use or sale of illegal drugs on the mill premises, Petitioner (hereinafter sometimes referred to as the "Union") filed grievances on behalf of the discharged employees. The grievances ultimately were submitted to arbitration.[2]

The bargaining agreement provides that the Company has "the sole right to . . . discharge . . . for proper cause." Petitioner's Appendix (hereinafter "App.") 43a. It further provides that violation of Rule 7(A) "is considered cause for discharge." The arbitrator found that the three grievants, in fact, violated Rule 7(A) and acknowledged that such violations were dischargeable offenses. She nevertheless ordered the employees reinstated because she found Rule 7(A) ambiguous in that its heading, "Causes for Discharge," contains no verb and in that it fails to state that violations unequivocally "will be" cause for

---

[2]In fact, twelve employees were simultaneously discharged for violation of Rule 7(A). The grievances involved herein, together with the grievance of Marshall Buhelt, were consolidated with a fifth grievance filed on behalf of Roland Villacci and assigned to Arbitrator Suzanne Gwiazda. Prior to hearing, the Union voluntarily dismissed the Villacci grievance. Arbitrator Gwiazda upheld the discharge of Mr. Buhelt. Five other grievances were consolidated and assigned to Arbitrator Theodore Role, whose award is the subject of another related and pending proceeding. The Union never filed grievances on behalf of the remaining two discharged employees.

discharge. App. 66a-67a. The arbitrator also observed that, under the contract, the Company "chose to retain discretion over such decisions" regarding discipline for violation of Rule 7(A). App. 67a.

The arbitrator then reasoned that the Company's retention of discretion over discipline somehow "allowed a third party neutral [i.e., the arbitrator] the same discretion when reviewing the propriety of those [disciplinary] decisions." App. 67a. *See also* App. 87a. In other words, because the Company made certain at the bargaining table to retain for itself the "sole right" to decide to discharge for proper cause, it also subjected such discretionary decisions to arbitral review.

The arbitrator, therefore, reviewed *de novo* the "fairness" of the Rule 7(A) discharge decisions by weighing various "mitigating circumstances."[3] Despite her finding that there was no past practice with respect to possession, use or sale of drugs on mill premises, App. 74a, she also examined the relative severity of discipline imposed for other unrelated employee misconduct. *See, e.g.*, App. 68a-69a. She found that although the grievants' "drug activity in the workplace must be viewed as very serious misconduct," App. 84a, "as a matter of equity," discharge was an excessively harsh punishment for such misconduct. *See* App. 84a, 87a, 89a, 92a.

---

[3]For example, in determining the "fair" penalty for Linda Willoughby, the arbitrator specifically took into account her seniority, work record, difficult working conditions, initial resistance to the undercover agent and possession of marijuana for post-work enjoyment. App. 92a. "Balancing the seriousness of drug possession against the many mitigating factors in Ms. Willoughby's case," the arbitrator "conclude[d] that the fair penalty is a four-month suspension." App. 93a.

The United States District Court for the District of Maine confirmed the arbitrator's award reinstating the discharged employees. The United States Court of Appeals for the First Circuit reversed the district court decision, holding that the arbitrator exceeded her authority by substituting her extra-contractual view of fairness and equity for the Company's collectively bargained right to discharge employees who use, possess or sell drugs at work. App. 14a-15a. The First Circuit also held that the arbitrator's award violated the dominant and well-defined public policy against drugs in the workplace. App. 18a.

The question for this Court is whether this case involving the construction of the parties' contract presents an issue with respect to which there is a direct and important conflict of the circuit courts of appeals which requires Supreme Court resolution, presents such an important constitutional or statutory question as to warrant review or, for any other reason, demands this Court's attention.

———o———

REASONS FOR DENYING THE WRIT

A. THERE IS NO CONFLICT AMONG CIRCUITS.

The First Circuit decision is in accord with, and expressly relied on, decisions in the Sixth and Tenth Circuits. *See Morgan Services, Inc. v. Local 323, Chicago & Central States Joint Board,* 724 F.2d 1217 (6th Cir. 1984); *Int'l Bhd. of Firemen & Oilers, Local 935-B v. Nestle Co.,* 630 F.2d 474 (6th Cir. 1980); *Mistletoe Express Service v. Motor Expressmen's Union,* 566 F.2d 692 (10th Cir. 1977). The First Circuit also relied on the Fourth Circuit decision

in *Textile Workers Union, Local 1386 v. American Thread Co.*, 291 F.2d 894 (4th Cir. 1961). App. 13a-14a.

Petitioner maintains, however, that the decisions of the Third, Fifth, Seventh and Eighth Circuits stand "in stark contrast" to, and are in direct conflict with, the decisions of the First, Sixth, Tenth and, presumably, Fourth Circuits. This simply is not the case. *Not one* of the Third, Fifth, Seventh and Eighth Circuit decisions cited by Petitioner contains any statement rejecting, or even mildly criticizing, the Sixth and Tenth Circuit decisions with which they allegedly conflict; nor do they acknowledge the existence of the conflict suggested by the Union.

Indeed, the Third Circuit, far from rejecting the Sixth and Tenth Circuits' decisions, has expressly approved them. In *Kane Gas Light & Heating Co. v. Int'l Bhd. of Firemen & Oilers, Local 112*, 687 F.2d 673 (3d Cir. 1982), *cert. denied*, 460 U.S. 1011 (1983) (upholding award reinstating employee discharged for insubordination on ground that arbitrator found that discharged employee was not, in fact, insubordinate), the Third Circuit distinguished and expressly approved the Sixth Circuit's decision in *Int'l Bhd. of Firemen & Oilers, Local 935-B v. Nestle Co.*, 630 F.2d 474:

> *Nestle*, however, merely stands for the proposition—*with which we fully agree*—that an arbitrator's decision should be vacated when the arbitrator finds facts that constitute grounds for discharge under the collective bargaining agreement, but, in disregard of those facts and the terms of the agreement, refuses to uphold the discharge.

687 F.2d at 680 (emphasis supplied). The court also specifically cited with approval the Tenth Circuit's decision

in *Int'l Union of Operating Eng'rs, Local 670 v. Kerr-McGee Refining Corp.*, 618 F.2d 657 (10th Cir. 1980) (following *Mistletoe*, court vacated award wherein arbitrator ignored provisions in agreement making the giving of false statements to obtain sick leave grounds for discharge). *Id.; see also H. K. Porter Co. v. United Saw, File & Steel Products Workers*, 333 F.2d 596, 602 (3d Cir. 1964) ("[a]rbitrator was unjustified in deviating from the plain mandate" of contract).

Thus, the Third Circuit's approach to the question presented herein clearly does not conflict with the Sixth or Tenth Circuits' decisions relied on by the First Circuit below. And yet the Third Circuit is one of the circuits upon which Petitioner principally relies to illustrate the existence of a conflict worthy of this Court's attention.

The Fifth, Seventh and Eighth Circuits also agree with the premise underlying the First Circuit's decision, namely, that an arbitrator may interpret ambiguous language but may not disregard or modify plain and unambiguous contract language. App. 18a. For example, the Seventh Circuit has cited approvingly the Sixth Circuit decision in *Morgan Services*, 724 F.2d 1217, 1222-24, for the proposition that "the arbitrator may not modify the contract unless authorized to do so." *Ethyl Corp. v. United Steelworkers*, 768 F.2d 180, 186 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1184 (1986); *see also Young Radiator Co. v. Int'l Union, U.A.W.*, 734 F.2d 321, 325 (7th Cir. 1984) (where contract gave employer right to discharge for theft, arbitrator's decision that discharge was proper only if theft was "motivating cause" for discharge did not draw its essence from contract); *Trailways Lines, Inc. v. Trailways, Inc. Joint Council*, 807 F.2d 1416, 1421

(8th Cir. 1986), *reh. denied*, 817 F.2d 1333 (8th Cir. 1987) (*citing with approval* Tenth Circuit decision in *Kerr-McGee* and Sixth Circuit decision in *Detroit Coil Co. v. I.A.M.*, 594 F.2d 575 (1979)); *St. Louis Theatrical Co. v. St. Louis Theatrical Bhd., Local 6*, 715 F.2d 405, 409 (8th Cir. 1983) (arbitrator exceeded authority by balancing equities of company's discipline where "agreement [was] not susceptible to a construction beyond its plain meaning"); *Truck Drivers & Helpers Union, Local 784 v. Ulry-Talbert Co.*, 330 F.2d 562, 566 (8th Cir. 1964) (where clear intendment of contract was that, in event of discharge, arbitrator would not substitute his judgment for that of employer, arbitrator exceeded authority by reducing penalty after finding employee guilty of acts charged); *Teamsters, Local 657 v. Stanley Structures, Inc.*, 735 F.2d 903, 905 (5th Cir. 1984) ("arbitrator may not disregard or modify plain and unambiguous provisions of the agreement") (*citing with approval Storer Broadcasting Co. v. Am. Fed'n of Television & Radio Artists*, 600 F.2d 45, 47 (6th Cir. 1979), *cert. denied*, 454 U.S. 1099 (1981)).

In short, there is no conflict among the circuit courts of appeals on the fundamental point that an arbitrator may not refuse to uphold, on fairness grounds, the discharge of an employee once the arbitrator finds facts clearly constituting grounds for discharge under the bargaining agreement. Because the First Circuit did no more than apply this elemental principle, the petition should be denied.

B. THIS CASE RAISES NO IMPORTANT QUESTION OF FEDERAL LAW.

The First Circuit's holding that the arbitrator exceeded her authority by entering the domain of the pro-

priety of the penalty raises no important question of federal law. Rather, the court merely followed the doctrines of the *Steelworkers Trilogy* and applied them to the particular facts at hand.

The First Circuit premised its decision on the well-established principle that, although arbitrators are to be given great latitude in interpreting collective bargaining agreements, judicial deference to arbitral awards is not absolute. *See AT & T Technologies, Inc. v. Communication Workers*, 475 U.S. 643, —, 106 S. Ct. 1415, 1418 (1986) (whether bargaining agreement creates duty to arbitrate a particular question is "undeniably an issue for judicial determination"). Specifically, arbitrators may not dispense their own brand of industrial justice but are confined to the interpretation and application of the parties' bargaining agreement; "all arbitration awards must draw their essence from the collective bargaining agreement." App. 5a, *citing United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). By ignoring such provisions and substituting her own view of the appropriate penalty for that of the Company, the arbitrator exceeded her authority, and her award failed to draw its essence from the bargaining agreement.

It is clear, under the *Steelworkers Trilogy*, that an award does not "draw its essence from" a contract when such an award abandons the contract in favor of the arbitrator's own agenda for industrial justice. *Enterprise Wheel & Car*, 363 U.S. at 597. Far from undermining the *Steelworkers Trilogy*, the First Circuit decision simply applies its teachings. Thus, neither this case nor any other

First Circuit decision[4] threatens or even questions the important principles set forth in the *Steelworkers Trilogy*. On the contrary, applying an extremely deferential standard of review to arbitral awards, it has consistently enforced the awards of arbitrators who have confined themselves to the interpretation and application of the bargaining agreement.[5]

Of course, different cases applying the *Steelworkers Trilogy* necessarily produce varying results both among the circuits and within each circuit. These differences, however, are caused, not by any fundamental disagreement as to the standard of judicial review of arbitral awards, but by factual differences, such as differences in the particular contracts involved and in arbitral factual findings as to whether the employee engaged in the misconduct alleged. *Compare, e.g., Fabricut, Inc. v. Tulsa General Drivers, Warehousemen & Helpers, Local 523*, 597

---

[4]*See, e.g., Posadas de Puerto Rico Assoc., Inc. v. Asociacion de Empleados de Casino de Puerto Rico*, 821 F.2d 60, 61 (1st Cir. 1987) (lamenting the "exasperating frequency" with which meritless challenges to arbitral awards are brought, court awarded double costs to appellee); *Bechtel Constr., Inc. v. Laborers' Int'l Union*, 812 F.2d 750 (1st Cir. 1987); *Int'l Bhd. of Firemen & Oilers, Local 261 v. Great Northern Paper Co.*, 765 F.2d 295 (1st Cir. 1985); *Trustees of Boston Univ. v. Boston Univ. Chapter, Am. Ass'n of Univ. Professors*, 746 F.2d 924 (1st Cir. 1984).

[5]Furthermore, Petitioner is inaccurate in its attempt to show the Court that there is a growing trend at the federal appellate level to overturn or vacate arbitral awards. Contrary to footnote 10 on page 19 of the Petition for Writ of Certiorari, among labor arbitration cases decided by the circuit courts of appeals, there has been, in fact, a significant *decline* in the percentage of arbitral awards being overturned: our reading of the confusing source relied on by Petitioner reflected a 37.8% vacate rate from 1971-1975 but only a 26.1% vacate rate from 1981-1985.

F.2d 227 (10th Cir. 1979) *and Industrial Mutual Ass'n v. Amalgamated Workers, Local 383,* 725 F.2d 406 (6th Cir. 1984) *with Mistletoe Express Service v. Motor Expressmen's Union,* 566 F.2d 692 (10th Cir. 1977) *and Local 342, U.A.W. v. T.R.W., Inc.,* 402 F.2d 727 (6th Cir. 1968), *cert. denied,* 395 U.S. 910 (1969).

Thus, the question in any given case is whether a court was correct in concluding, based on the facts before it, that the award did or did not draw its essence from the contract. That each case necessarily turns on the specific agreement and factual findings involved would explain why this Court has routinely decined to review such cases, regardless of whether the arbitral award, in the particular case, was confirmed or vacated.[6]

This case, too, turns on the specific agreement negotiated by the local unit of production workers and the Company, as well as on the arbitrator's findings that the

---

[6]*See, e.g., Teamsters, Local 863 v. Jersey Coast Egg Producers,* 773 F.2d 530 (3d Cir. 1985), *cert. denied,* 106 S. Ct. 1468 (1986); *Ethyl Corp. v. United Steelworkers,* 768 F.2d 180 (7th Cir. 1985), *cert. denied,* 106 S. Ct. 1184 (1986); *Manhattan Coffee Co. v. Int'l Bhd. of Teamsters, Local 688,* 743 F.2d 621 (8th Cir. 1984), *cert. denied,* 471 U.S. 1100 (1985); *Super Tire Eng. Co. v. Teamsters, Local 676,* 721 F.2d 121 (3d Cir. 1983), *cert. denied,* 469 U.S. 817 (1984); *Sears, Roebuck & Co. v. Teamsters, Local 243,* 683 F.2d 154 (6th Cir. 1982), *cert. denied* 460 U.S. 1023 (1983); *Arco Polymers, Inc. v. Local 8-74,* 671 F.2d 752 (3d Cir.), *cert. denied,* 459 U.S. 828 (1982); *F. W. Woolworth Co. v. Miscellaneous Warehousemen's Union,* 629 F.2d 1204 (7th Cir. 1980), *cert. denied,* 451 U.S. 937 (1981); *Storer Broadcasting Co. v. Am. Fed'n of Television & Radio Artists,* 600 F.2d 45 (6th Cir. 1979), *cert. denied,* 454 U.S. 1099 (1981); *Detroit Coil Co. v. Int'l Ass'n of Mach. & Aerosp. Workers,* 594 F.2d 575 (6th Cir.), *cert. denied,* 444 U.S. 840 (1979); *Amoco Oil Co. v. Oil, Chemical & Atomic Workers Int'l Union,* 548 F.2d 1288 (7th Cir.), *cert. denied,* 431 U.S. 905 (1977); *Local 342, U.A.W. v. T.R.W., Inc.,* 402 F.2d 727 (6th Cir. 1968), *cert. denied,* 345 U.S. 910 (1969).

grievants were guilty of the acts alleged and that, *under the contract,* the Company reserved the discretion to discharge for such acts. Under the terms of that agreement, the parties removed from arbitral consideration the question of the appropriate or just penalty for possessing, selling or using marijuana on mill property. The arbitrator's conclusion that she was free to assess the equities of the discharge decisions simply was not based on, and did not draw its essence from, the contract.

In sum, the decision below presents no issues demanding the attention of this Court. This case involves no important constitutional issue or undecided statutory issue. Instead, the case reflects the First Circuit's application of the long-standing teaching that a federal court must refuse enforcement of an award by an arbitrator who does not "confine [herself] to interpretation and application of the collective bargaining agreement." *Enterprise Wheel & Car,* 363 U.S. 593, 597 (1960).

C. THE PENDING MISCO CASE IS NOT A REASON TO GRANT CERTIORARI IN THIS CASE.

As Petitioner notes, one reason the First Circuit reversed the district court decision was that the arbitrator's award violated the public policy against drugs in the workplace. This Court has this term granted certiorari and heard oral argument in a case involving nearly identical facts and issues of public policy. *Misco, Inc. v. United Paperworkers Int'l Union,* 768 F.2d 739 (5th Cir. 1985), *cert. granted,* 107 S. Ct. 871 (1986) (No. 86-651). The pendency of the *Misco* decision suggests, if anything, the propriety of this Court postponing a decision to grant certiorari on the public policy question until it renders a decision in the *Misco* case.

If this Court affirms the Fifth Circuit decision, there will be no need for the Court to review the instant case because one of the grounds on which the circuit decision rests shall already have been sustained by the Court. Moreover, even if this Court reverses the Fifth Circuit's *Misco* decision, there is no reason to review this case because, as demonstrated above, the other ground upon which the First Circuit reversed the district court decision presents no important question of federal law or conflict with the other circuit courts of appeals, but, rather, merely reflects proper application of a universally accepted principle of labor law to a specific labor agreement.

—o—

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit be denied.

DATED: November 10, 1987

Respectfully submitted,

S. Mason Pratt, Jr.
(Counsel of Record)
Elizabeth Pearce Hunt
Stephanie E. Lugg

Pierce, Atwood, Scribner,
Allen, Smith & Lancaster
One Monument Square
Portland, Maine 04101
(207) 773-6411